85-1725

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. _____

IN THE SUPREME COURT

of the

UNITED STATES

_____

_____ Term 1986

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Kathleen Kennedy
Petitioner,
vs.
General Services Administration (GSA)
Respondents.

_____

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FEDERAL CIRCUIT

_____

ELIZABETH G. LEAVY
CARROLL, BURDICK & McDONOUGH
One Ecker Building, Suite 400
Ecker and Stevenson Streets
San Francisco, CA 94105
(415) 495-0500

Attorneys for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. May a federal employee be dismissed for the negligence of a subordinate where there was no finding that the delegation of duties to that subordinate was negligent in and of itself?

2. Can a federal employee be dismissed for an alleged participation in the omission of significant information from an official report intended for Congress where such participation consists only of the employee's failure to "whistle blow" on her superior?

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TO THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner Kathleen Kennedy respectfuly prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Federal

Circuit which affirmed the decision of the Merit Systems Protection Board sustaining Petitioner's removal from Federal Service and for an order reversing the removal.

OPINION BELOW

The opinion of the United States Court of Appeals for the Federal Circuit was ordered not published in a printed volume and is reproduced in Appendix A to this Petition. The prior order of the full Merit Systems Protection Board is unreported and is reproduced in Appendix B. The opinion and order of the presiding official for the Merit Systems Protection Board is unreported and is reproduced in Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit was entered on December 19, 1985. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

In September 1982, after almost ten years of unblemished service with the federal government, Petitioner, Kathleen A. Kennedy, was dismissed from her position as Region 9 Leasing Branch Chief and from employment with the General Services Administration (GSA) after the branch inadvertently failed to provide a required 360-day notice to exercise an option to renew a lease for the government in a San Francisco office building. The GSA charged Petitioner with (1) negligent administration of Region 9 leases and (2) omission of material information from a document intended for Congress.

Ms. Kennedy appealed the GSA's decision to dismiss to the Merit Systems Protection Board pursuant to 5 U.S.C. § 7701(a). In July 1983, a 4-day evidentiary hearing was held in San Francisco before the Honorable Edward G. Reidy,

acting as presiding official for the board. Pursuant to 5 U.S.C. § 7701(c)(1)(B), the government had the burden of proving, by a preponderance of the evidence, that the charges against Petitioner were true, that there was a nexus between the taking of disciplinary action against Appellant and the efficiency of the service, and that the particular penalty selected -- removal -- was appropriate.

The evidence before the presiding official showed that the option was missed because a computerized lease file contained an erroneous renewal date, which date had been entered into the computer seven years before Petitioner took her position as Leasing Branch Chief. The GSA did not argue before the Merit Systems Protection Board that Petitioner was responsible for the faulty input or that prior to the discovery of the missed option she had any information that the

lease file in fact contained faulty information.

The evidence showed that Ms. Kennedy had delegated the responsibility for ensuring the accuracy of the particular lease file to one of her subordinates, a GS-12 leasing specialist who was assigned to the lease pursuant to the organizational structure of Region 9. GSA argued before the Board that Ms. Kennedy should have personally reviewed lease files to check the accuracy of the information for all the leases (over 700) for which Region 9 Leasing Administration was responsible. Thus GSA essentially argued, and the Board accepted, the proposition that Petitioner had a personal duty to ensure that no mistakes were made by any of her subordinates. Thus, in essence, the Board accepted the GSA's argument that, despite the existence of a bureaucratic structure which contemplated delegation of authority

to subordinates, Ms. Kennedy, as supervisor, was absolutely liable for any mistakes of her subordinates, even if the delegation of authority to the subordinate was proper. Thus, the Board held Petitioner responsible for the fact that her subordinate failed to notice the faulty lease information, despite the fact that it made no finding that petitioner was negligent in her delegation of authority to the subordinate.

With respect to the charge regarding the alleged "participation" in the omission of significant information from an official report intended for the Congress of the United States, the evidence before the Board established without dispute that Petitioner neither prepared the "official report" in question -- a prospectus -- nor ordered the omission of any information from the prospectus.

The main thrust of the GSA's argument regarding this supposed participation in the omission of material from the prospectus was that Petitioner, who, like several other people who were not disciplined, knew of the omission, should have reported the omission to an authority higher than her superior. The Merit Systems Protection Board accepted the Board's finding despite the fact that Petitioner showed that she reasonably believed that her superior had contacted the proper authorities in Washington regarding this omission of data.

Ms. Kennedy appealed the decision of the Merit Systems Protection Board to the Court of Appeals for the Federal Circuit, pursuant to 5 U.S.C. § 7703(b)(1).

REASONS FOR GRANTING THE WRIT

1. The Holding Of The Presiding Official Of The Merit Service Protection Board And The Subsequent Affirmance By The Federal Circuit Court Of Appeals Creates A Rule That Supervisors May Be Removed For The Mistakes Of Their Subordinates Even Where The Delegation Of Duty To That Subordinate Was Reasonable.

The Federal Circuit's affirmance of the decision by the Merit Service Protection Board has possibly devastating implications for the continued functioning of the system of federal service.

The Board's decision is tantamount to a holding that the director of every agency, department and division in the federal government should be held responsible for the mistakes of his or her subordinates even if the superior has properly delegated duties within the chain of command and is not personally responsible for any of the mistakes. Such

decision violates all standards applicable to removal of employees from the federal service.

Under 5 U.S.C. § 7501(a) and 5 U.S.C. § 7701(c)(1) the Merit Systems Protection Board may uphold an agency's decision for removal only if that decision is supported by a preponderance of the evidence and will serve to promote the efficiency of the service. Courts have interpreted these statutes to require the agency to prove that in fact the employee committed the act with which he is charged. Crofoot v. United States Government Printing Office, 761 F.2d 661 (Federal Circuit 1985). An agency action which is based on an unsupported premise must be set aside. Mizerak v. Adams, 682 F.2d 374 (2d Cir. 1982).

In this case, there was never any finding that Petitioner had been responsible for the original inaccurate input of

data into the computer system. Further, there was never any finding that Petitioner was made aware of the inaccuracy of data. There was also no finding that the organization of Petitioner's agency, which organization was in place before Petitioner became head of the agency, was an improper organization.

The uncontroverted evidence before the Board showed that Petitioner had specifically ordered the leasing specialist in charge of the lease to verify the accuracy of the leasing data, paying particular attention to data regarding option renewal requirements (the data that in fact had been inaccurately inputted in the system) by checking the original leasing documents to ascertain that the data in the computer was consistent with the data in the original file. Petitioner received a report from the leasing specialist that she had verified the data

and that it was accurate. At no time did the government argue that Petitioner had not made this assignment or received this report, or that Petitioner had any reason to believe that the specialist was incapable of performing her assigned duties.

Thus, the only grounds for the decision for removal was that such removal was justified because a subordinate to whom Ms. Kennedy had made a justifiable delegation had inexplicably made an error. Such a finding ignores the reality of government administration. Petitioner had a right, and in fact a duty, to work within the framework of the administration of which she was a branch chief. The structure of this system mandated that the details of any lease, including the one at issue in the case, were to be managed by the high-level, experienced leasing specialist. It cannot be said that the efficiency of the service will be served

by removing all federal employees who work within the organizational structure of their agency. This Court must provide guidance in the proper interpretation of cause to remove a federal employee to the Federal Circuit (the only court of appeals to whom federal employees may appeal in cases not involving discrimination).

2. The Decision Of The Federal Circuit Creates A Rule Justifying Removal Of Any Federal Employee Who Fails To "Whistle Blow"

The decision of the Federal Circuit Court of Appeals affirmed the Merit System's Protection Board's removal of Petitioner for "participating" in the omission of information from a prospectus intended for Congress. This finding of supposed participation was entirely unsupported and in fact was contradicted by all the record evidence. The head of Region 9 planning, who was responsible for preparation of the prospectus, Petitioner's

supervisor (who was also supervisor of the planning branch), and Ms. Kennedy herself all testified that she had no authority over the Planning Branch. All testified that she could not have ordered anyone in the Planning Branch to remove data from the prospectus. Both the head of the Planning Branch and Ms. Kennedy's supervisor, Joseph Yiakis, testified that, in fact, it was Yiakis who ordered the head of the Planning Branch to remove the information.

It is significant to note that the head of Planning, who was in fact responsible for the preparation of the prospectus, and deleted the information, was not removed from her employment with the federal government.

Ms. Kennedy's alleged participation in the omission consisted merely of the fact that she knew her supervisor had ordered the deletion. The uncontroverted

evidence showed that Ms. Kennedy reasonably understood by statements made by Yiakis that he had informed the proper authorities about the deletion.

The decision of the Federal Circuit in affirming the decision of the Board places a novel burden on federal employees. Pursuant to this decision, any federal employee may be removed merely for knowing about the possibly improper acts of fellow employees even if he or she does not participate.

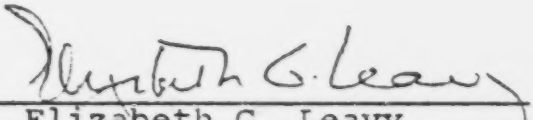
CONCLUSION

The decision of the Merit System's Protection Board and the affirmance by the Federal Circuit Court of Appeals have introduced novel and insupportable elements into the law of federal employment. Pursuant to these decisions, no federal employee may now safely delegate authority pursuant to the organizational structure of his or her agency. Furthermore, every

employee who fails to "whistle blow" on his or her supervisor is subject to removal. The decisions involved in this case indicate that an agency can remove a federal employee for acts for which she was not responsible, using a "guilt-by-association" standard. It is incumbent upon this Court to instruct the Federal Circuit Court of Appeals that such a standard violates the standards for removal for federal employees set forth by Congress in 5 U.S.C. § 7501.

Respectfully submitted,

CARROLL, BURDICK & McDONOUGH

By 

Elizabeth G. Leavy
One Ecker Building, Suite 400
Ecker and Stevenson Streets
San Francisco, CA 94105
(415) 495-0500

CERTIFICATE OF SERVICE

A copy of the foregoing Petition for Writ of Certiorari with accompanying appendices was mailed this date to

Renn C. Fowler, Esq.
General Services Administration
525 Market St., 28th Flr., 9L
San Francisco, CA 94105

and to

Office of the Special Counsel
Merit Systems Protection Board
1120 Vermont Avenue, NW
Washington, DC 20419

and to

David Cohen, Esq.
Director, Commercial
Litigation Branch
Civil Division
U.S. Dept. of Justice
Washington, DC 20530
Attn: Second Floor
Classifications Unit

Dated: March 17, 1986

ELIZABETH G. LEAVY

Appendix A

Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

United States Court of Appeals
for the Federal Circuit

KATHLEEN A. KENNEDY,	)	Appeal No.
	)	85-2165
Petitioner,	)	
	)	
v.	)	
	)	
GENERAL SERVICES ADMINISTRATION,	)	
	)	
	)	MSPB Decision
Respondent.	)	No. SF07528310148

DECIDED: December 19, 1985

Before MARKEY, Chief Judge, and BALDWIN and NIES, Circuit Judges.

PER CURIAM.

DECISION

The decision of the Merit Systems Protection Board (board) sustaining petitioner's removal for negligent administration of leases and for participating in the deliberate omission of significant information from an official report intended for the Congress of the United States, is affirmed.

OPINION

Petitioner's arguments are adequately treated in the board opinion dated January 14, 1985. We affirm on the basis of that opinion.

Appendix B

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

KATHLEEN A. KENNEDY, Appellant v. GENERAL SERVICES ADMINISTRATION, Respondent	)	DOCKET NO. SF07528310148

INITIAL DECISION

By: Edward J. Reidy
Administrative
Law Judge

Date: November 30, 1983

With Appearances By:

Elizabeth Leavy, Esquire, for appellant.
Renn C. Fowler, Esquire, for respondent.

INTRODUCTION

On November 5, 1982, appellant was removed from her position as Chief,

Leasing Branch, Real Estate Division, Public Building Service, General Services Administration, (GSA) Region 9, San Francisco, California, for (a) negligent administration of Region 9 leases and, (b) participating in a deliberate omission of significant information from an official report intended for Congress. When removed, appellant was a GM-14. Her timely appeal has been assigned to me for processing and issuance of an initial decision. Oral hearing was held in San Francisco on July 11-14, 1983. Both appellant and respondent filed post-hearing briefs later discussed.

BACKGROUND

On behalf of several agencies GSA leases space at 211 Main Street, San Francisco. The original lease covering this property was executed in 1972. Since then the lease has undergone changes and today 211 Main contains some 338,000

PUBLISHER'S NOTE:

The Following Pages Were Unavailable for Filming:

B-3

Because they were subject to different negotiations and terms, the renewal notice date for Units 2 and 3 was on or about June 25, 1982.[2]

While reviewing the lease at 211 Main preparatory to issuance of a prospectus[3] as a condition precedent to renewal, GSA staff in San Francisco discovered in early May of 1982 that the March renewal date evidently had gone by without necessary notice of GSA's intention to renew having been given to the landlord. Alarmed over the prospect of such a serious oversight, various realty specialists and intermediate supervisors made close and personal studies of the lease. Once it appeared unmistakable that the oversight had in fact occurred, their superiors were

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[2]Multi-unit leases are no longer permitted. (IV-584)

[3]A prospectus is a document containing advance information about leases under consideration by GSA.

notified on May 28. This is the date on which appellant first was made aware of the omission. She promptly notified her own supervisor, Joseph Yiakis, of the problem and he directed her to make a personal verification of the apparent oversight. She did. On about June 4 she reported to him the renewal date on Unit 1 clearly had been missed.

Interestingly, her close analysis of records covering the 211 Main property also revealed to appellant that some 5 years previously GSA had overlooked the same lease option renewal date. Buoyed by the the discovery that, in 1977, the same landlord had been persuaded by GSA staff to waive the notice period without financial penalty to GSA, appellant and her supervisor were encouraged to try to salvage the wreckage of the missed date by seeking a comparable waiver in 1982. (III-477; IV-698, 699)

During most of June and July appellant and Yiakis tried unsuccessfully to persuade the landlord again to waive the notice proviso as he had in 1977. While negotiating with the landlord they did not advise any of their senior staff of the oversight. By July 22 it became evident that this effort had failed. It was at this time that senior officials of Region 9 were notified of the missed lease option date. (III-448, 495; IV-705-707) There followed an investigation into the circumstances of the missed lease option and, as a result, penalties were meted out to a number of personnel. Appellant was removed. So was Yiakis.

THE APPELLANT

At the time appellant was removed in November of 1982 she had accumulated 10 years of Federal service and had performed at increasingly important positions. Throughout her entire career Kennedy had

received performance evaluations of either outstanding or highly successful. Indeed, her most recent supervisor (Yiakis) characterized her as the best person in GSA in performing duties as leasing branch chief. Notably, the charges here are the only clouds which appear on her entire career with the Federal government.

On April 15, 1982, GSA underwent a reorganization Prior to that time what was the Leasing Branch in the Real Estate Division had been the Acquisition Branch in the Space Management Division. The duties and responsibilities of the newly named branches remained the same, and so, while Kennedy was actually removed from her position of Chief, Leasing Branch, during certain of the time periods relevant she was Chief, Acquisition Branch. Among the duties of the Leasing Branch were (1) preparation of lease prospectuses in conjunction with the

planning staff; and (2) administration of the regional lease program.

In addition to her assignment as branch chief, appellant was a warranted contracting officer. As such, she was one of but a few GSA officials authorized to enter into and administer contracts on behalf of the Federal government. She was the central figure of the leasing process and could execute extensive leases and commit the government to expenditures without limitation. It was, to be sure, a very important job for which she held significant and concomitant responsibility. (I-190; 158-160) In particular she was personally responsible for proper negotiation and administration of leases and the contracting officer is charged with the affirmative duty of acting on renewal options. (Agency Brief 50, 56) In this assignment she was vested with a broad range of discretion. (Agency Brief, 52)

RECITATION OF FACTS

The narrative conveniently begins with a memorandum dated August 24, 1981, wherein Central Regional Office (CRO), or Washington headquarters, alerted Region 9 about leases expiring in 1983 which might require prospectus preparation.[4] That same memorandum also sought information concerning renewal option dates and urged Region 9 to exercise care in preparing prospectuses. (I-36, 37; RX-3) In fact, although 211 Main was listed without an option renewal date the memorandum nonetheless did indicate the lease would expire on June 21, 1983. (I-39) When, in the fall of 1981, a prospectus was

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[4] For all leases with an average annual fair rental value exceeding $500,000.00, GSA must obtain approval from Congress to commit the monies. That approval is obtained by submitting to the appropriate committees a prospectus detailing the salient facts about the lease under consideration. (Respondent's Exhibit 22, or RX-22)

prepared for 211 Main it contained a number of errors, the most cogent of which was omission of the 360-day advance notice requirement. Customarily these notice periods are included in prospectuses. (I-79, 80, 82, 115) This oversight was detected in the CRO planning division which advised Region 9 that it would, by means of a footnote, insert the missing information into the prospectus. (I-79, 80) When the Chief of Region 9's planning branch was notified of the omission she informed another staff member who said he would advise Kennedy that CRO had to alter the prospectus. (I-80, 112) In addition, staff personnel in the planning branch were told to contact the appropriate case worker on Kennedy's staff in order to check the lease for 211 Main and verify once and for all that the renewal date was correct. (I-92) Staff personnel in planning felt that the oversight was

likely caused by an error in the Form 620, or lease digest. (I-106) Even though appellant's staff was aware of the need of CRO to correct the prospectus and the reason, it is not clear Kennedy was specifically told. By the same token, I find that she was not ignorant of the problem because of the modest size of the office and the frequency of staff contacts.

Later, (on or about May 25, 1982) it became necessary to withdraw those prospectuses prepared in 1981 and early in 1982 because they had not yet been acted on by Congress and some updating was necessary. (I-40; 127) Included was 211 Main. A subsequent memorandum from CRO, dated June 4, 1982, gave general directions concerning the updating of prospectuses and pointed out that the lease at 211 Main had a renewal notice date. (I-42) That memorandum also

directed that any prospectus submitted should be in final form, that is to say, ready for submission to the Congress. (I-42-44) In this connection, it is the practice of CRO to forward prospectuses to Congress once it completes a review unless substantial alterations are necessary. (I-55) If, however, there is a lapse between the time CRO receives a prospectus and when it is submitted to the Congress, CRO usually will check with the originating region for any possible changes. (I-50)

GSA has, in recent years, undertaken a number of initiatives in search of better ways to conduct its mission. One is greater reliance upon computers. As is particularly germane here, GSA now makes substantial use of the public building service information system (PBS/IS), a broad-based collection of computerized information. Input is generated by each

region and the data bank is retained at the central computer facility. (I-38) Among the uses to which the PBS/IS has been put is its retention of data relating to leases of public buildings. In turn, the information with respect to leases is used in prospectus preparation.

To guide officials charged with the duty of drafting prospectuses, GSA issues a handbook with instructions in preparing the document. The basic purpose of the prospectus is to "be completely informative" so that the handbook sets forth a description of information which must be included. (RX-22) GSA also has established a suggested schedule for preparing a prospectus and urges the regions to adhere to that target. (RX-21) The desideratum is for the prospectus on a particular property to be prepared, approved and forwarded to Congress and OMB, if necessary, for approval before any

formal action is consummated. There are, however, instances when formal agency action is undertaken prior to Congressional approval of a prospectus. In such instances, GSA forwards the completed prospectus to the Congress and then seeks retroactive approval of the action taken. What this means is that GSA considers, in certain circumstances, prospectus approval can be sought after-the-fact and, late in 1980 CRO sent a memorandum to Region 9 giving an opinion that lease options may legally be exercised in the absence of prior approval from Congress. (I-48, 51, 52)[5]

This very procedure seeking retroactive approval is the likely track to have been expected of the 1982

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[5] It appears that it is common knowledge in GSA that a lease option can be exercised without prior prospectus approval. (I-175; 178; 187)

prospectus dealing with Unit 1 or 211 Main once it was returned for updating. That is to say, Region 9 would have prepared a prospectus in final form, and forwarded it to CRO for review by its realty specialist. CRO, in turn, would forward an approved prospectus to either OMB or Congress, even after the fact. But in this instance, CRO became aware of the missed option date and the version prepared in Region 9 was stopped. An official from CRO stated that the prospectus prepared by Region 9 on Unit 1 could mislead a reviewer in CRO into believing that the lease option had been exercised if the reviewer was not careful. As ultimately submitted to Congress, the prospectus for 211 Main Unit 1 was substantially overhauled from that Region 9 had prepared.

Within each region, primary responsibility for prospectus preparation

is in the planning branch. (I-72) While that section should check prospectuses for accuracy, cross-checks with the acquisition (leasing) branch are expected. (I-56) It is the duty of the latter branch, the organization headed by appellant, to review prospectuses before their release. (I-76, 121) When the planning branch prepares a lease it normally releases it from the region in a form suitable for transmittal to the Congress. (I-77)

As mentioned, in June of 1982 it became necessary to prepare a new prospectus for 211 Main because the administrator withdrew all pending prospectuses. (I-127) While that prospectus was being redrafted the planning branch was notified that Kennedy did not want the 360-day notice included in the new 211 Main prospectus being prepared because it would make it apparent

a lease renewal option had been missed. (I-82) On inquiry Yiakis agreed that he desired that the notice be deleted. (I-84) Although the planning branch considered the deletion to be improper, it complied, but placed the lease option notice in the data sheet. That sheet contained information which was not truly part of the prospectus but which accompanied the prospectus and would be read by CRO. (I-82; 116) Later, appellant told planning the notice should be deleted from the data sheet as well. (I-128; 135) When appellant advised the chief of the planning branch that the 360-day notice requirement should be deleted from the prospectus, appellant said that any discussions on this matter should be directed to Yiakis. (I-120)

The chief of planning branch, in reviewing data for prospectuses, relied upon staff personnel for input, and

considered this a reasonable delegation of authority. (I-98; 108) But the planning branch expected its staff to look into the lease files to ascertain the specific terms of an existing lease. (I-103, 104)

GSA also prides itself on its extensive program whereby it keeps employees advised of the standards of conduct expected of them and alerts them to points of contact on counselling when matters of questionable conduct arise. (I-139-144)

To flesh out the background facts, mention of an audit and management review of Region 9 conducted in August of 1981 by CRO is pertinent. (II-202; 204) Because many of the lease files in Region 9 were in very poor condition, this review became a difficult task. (II-211; 212) In this regard, during the management review, discussions with appellant centered on the fact that the reliability of the PBS/IS

program "was not very good." (II-210; 237) In fact, its reliability was set at "about 20 percent" by most regions. (II-211)

Included in that review was an analysis of lease covering property at 550 Kearney [sic] in San Francisco, a randomly selected site. When the review team discovered that a lease option date had not been fully exercised on that property, it recommended that a manual system be inaugurated to keep abreast of these dates rather than rely solely on PBS/IS. (II-207, 208) The team was motivated by the realization that certain other regions which had manual systems had not missed any option dates. (II-209)

Region 9 disagreed with the recommendation to create a manual system, believing that improving the PBS/IS program was the best solution. (II-216, 220) The review team makes

recommendations, but it cannot compel compliance (II-218). A draft report of the audit review was submitted in February of 1982 and it was pointed out that Region 9 had missed a lease option. Region 9 later acknowledged an awareness that it failed to execute a renewal option even though the region had only 13 or 14 leases which contained option renewal dates. (II-213, 219, 232)

BRIEFS

Both appellant and the agency filed post-hearing briefs, here summarized. Respondent, argues that: (a) appellant's conduct as a senior management official in Region 9 was negligent, costly and irresponsible; (b) her conduct clearly was a breach of her duties and that she, not subordinates, was responsible and accountable for the oversight with respect to 211 Main; (c) she actively participated in the attempt to limit

disclosure of the missed option; and (d) the decision to remove appellant is reasonable and appropriate in light of the seriousness and nature of her misconduct.

GSA points out that appellant held the dual roles of Branch Chief and warranted contracting office having supervisory leasing responsibility for 211 Main. It claims that the very importance of these assignments should have motivated her to institute verification procedures which would have prevented the gross error which was committed. It maintains, too, that appellant and her supervisor embarked upon a course of conduct designed to limit disclosure of the missed option debacle by omitting vital information from a prospectus relating to the lease of Unit 1.

With respect to appellant's insistence that she was prudent in her

reliance upon subordinates, GSA says such reliance is wholly misplaced where, as here, appellant never did her initial homework in reviewing the leases. GSA claims appellant did not delegate, she abdicated. The agency concedes, as it must, that reliance on subordinates is necessary and proper in certain circumstances, but counters that this is not such a case because an important lease is involved.

That the appellant attempted to limit disclosure of the missed option is evident to the agency because the responsibility for prospectus preparation was, at least in part, that of the appellant. Moreover, GSA says it is most likely that she has violated 18 U.S.C. section 1001, "The False Statements Act." Be that as it may, GSA insists that appellant participated in the deliberate omission of salient information from an official document, as charged.

GSA concludes that removal is plainly within a zone of reasonableness for the offenses committed because appellant, holding a responsible position, is guilty of misdeeds which strike at the very heart of her duties and because the notoriety generated in news media has adversely impacted on the agency's reputation and unquestionably damaged public trust in GSA.

In her closing brief, appellant maintains that neither of the charges made against her were "supported by substantial evidence"[6] and that even if the Board finds either charge sustained, removal is far out-of-line.

After reciting the procedural history and offering a statement of facts, appellant's brief argues specifically

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[6] The standard applicable is, however, that of a preponderance of the evidence, an even greater burden. See 5 C.F.R. section 1201.56.

that: (1) there has been no showing Kennedy has acted as other than a reasonably prudent manager in the performance of her duties; (2) delegation by her of important assignments to trusted subordinates was consistent with generally accepted standards of care; (3) the allegation she failed to develop a system to backup the PBS/IS system overlooks the attention appellant consistently gave to reviewing all important lease information whenever a new realty specialist was assigned; (4) even an official holding a contracting warrant must rely upon subordinates; and (5) inasmuch as she was merely the conduit for passing instructions with respect to the omission of information from the prospectus, she in no way can be found to have engaged in a cover-up.

In discussing the penalty of removal, appellant insists it is inappropriate here

because the agency unfairly relied on consequences of the missed option instead of taking into consideration specific circumstances surrounding its happening. Also, attention is drawn to Kennedy's consistently outstanding work record during her decade of service; her continued exemplary performance even during the negotiations over the missed option; and the fact that others in Region 9 received punishment somewhat less severe than she did.

Finally, appellant alleges that the agency should be precluded from introducing evidence or raising issues not included in its Notice of Proposed Removal. In the latter connection, while it would violate the basic procedural rights of employees were the Board to sustain agancy action taken on the basis of charges that could have been levied, but were not, the Board will consider all

relevant evidence adduced, including that made at hearing which is in addition to that considered at the agency level in making a determination of whether changes are sustainable. See Johnston v. Government Printing Office, 5 MSPB 376 (1981). In this appeal, no rights of appellant have, in my opinion, been violated.

As to the charge that appellant was negligent in carrying out her duties as Branch Chief of the leasing group, appellant contends that the agency bore, but failed to sustain, its burden of establishing that she was somehow negligent because she did not have personal knowledge of all the terms of the major leases for which she was contracting officer. Appellant also disputes any implication of negligence in her alleged failure to implement a manual tracking system, contending that she acted

reasonably in concluding that such a system was not feasible. Appellant also argues that the Kearny Street and Tucson options, mentioned in the notice of proposed removal, could not have put her on notice of problems with missed lease options because failure to exercise those options resulted when the leasing branch did not receive certification to do so.

As to the 1977 missed option at 211 Main Street, appellant denies being aware of that incident prior to 1982. Appellant also contends that, with regard to the Burlingame and Los Angeles leases, while she was aware of problems with multiple expiration date leases that she took all reasonable steps to prevent recurrence and overall her conduct was in accord with the accepted standard of care.

Appellant refutes the agency's allegation of negligence in that she was not personally familiar with the 211 Main

Street lease contract by stating that her delegation of assignments to verify the leases was reasonable, because the agency encouraged such delegation, and that appellant should not be held personally responsible for errors by trusted subordinates who act according to that delegation.

Regarding the charge of omitting data from a document intended for Congress, appellant disputes any testimony that she directed the omission, saying that she had no power to direct such an omission and was only conveying instructions of Yiakis.

DISCUSSION AND CONCLUSIONS

GSA removed appellant on the grounds that she was negligent in the conduct of her duties and participated in the deliberate omission of information from an official report. This misconduct was considered to be of such severity to warrant that penalty. If removal is to be

sustained on appeal, three separate and distinct determinations must underscore that action. It first must be shown that the misconduct charged is sustainable by a preponderance of the evidence. Next, there must be demonstrated that a sufficient nexus exists between whatever misconduct is sustained and the efficiency of the service. And finally, the penalty imposed upon Kennedy must have been appropriately chosen and within a zone of reasonableness in light of the specific facts and circumstances involved in the appeal. See generally Phillips v. Bergland, 586 F.2d 1007 (1978) and Young v. Hampton, 568 F.2d 1253 (1977).

The Misconduct I find that the charge of negligent administration of leases by appellant has been sustained by the preponderant evidence. Assigned the duty of overseeing leases in her area of responsibility, appellant failed to

establish procedures and controls necessary to insure information concerning leases was accurate. Her inattentiveness to her primary professional duties has resulted in needless and substantial loss to the government. It also has destroyed the confidence her superiors could place in her.

Several factors reveal Kennedy's carelessness in the performance of her duties as glaring. First, the property at 211 Main was the second of the largest and most important of all properties under lease in her area. Nevertheless, it does not appear to have been especially complex, although the multi-unit feature was somewhat unusual. Nor does the fact the lease and its supplements covered a number of volumes mean that 211 Main could not easily have been reviewed for its important features. (II-245) It is entirely reasonable to expect that a

responsible official would exercise care commensurate with the more important matters within his or her province. But the preponderant evidence of record establishes that appellant failed to exercise that degree of skill and knowledge consistent with her position and responsibilities with respect to 211 Main.

As mentioned, between 1977 and 1982 there had been several lease option dates overlooked within Region 9 and it beggars belief that respondent was unaware of this general problem.[7] Nevertheless she instituted no suitable procedures to insure oversights would not occur in her area. The PBS/IS system in use by GSA had the pervasive reputation of being plagued by information errors, suggesting that any reliance upon the data in that bank was

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[7] In the Spring of 1981 Kennedy was specifically made aware of a missed lease option in Los Angeles. (IV-588, 589, 681, 682)

indeed risky. (II-209, 210; IV-685) Yet Kennedy did put nearly exclusive reliance on it in lease prospectus matters.

Although one of her contracting officer duties with respect to the exercise of options was to provide written notice of renewals desired to be exercised, Kennedy did not do so with respect to Unit 1 on 211 Main. Without question the reasons the option was missed are several, but it is apparent that appellant did not acquaint herself with the terms of 211 Main when she became contracting officer in 1979; nor for that matter did she do so until the serious problem of the missed option came to light. (IV-695, 696) Indeed, it appears that she had no systematic program of review and only checked leases as problems cropped up. (IV-695, 696) The inescapable conclusion is that her efforts to insure accuracy of lease data were superficial. More was required.

In addition, it is evident that the appellant made no serious review of the lease digest with respect to Unit 1. (IV-695, 696) And this, despite the fact that Unit 1 was one of the very few in her area which contained an option renewal; despite the fact that multi-unit leases were known to have inherent problems; and notwithstanding that 211 Main was one of the most important properties in Region 9.

A review of this lease, or at least of its important terms, evidently could be completed in a matter of hours. And a review either of the lease, or the lease digest, of the Region's second largest lease would have put a careful reviewer on notice that it contained an optional renewal and, inherently, the potential for problems. Appellant maintained no methodology to cross-check data on renewal option dates, choosing instead to rely on the PBS/IS despite its reputation.

Clothed in the complete wardrobe both of a branch chief and a warranted contracting officer, the performance of appellant was seriously flawed. Her failure to carry out her duties in a careful and dependable manner has cost millions of dollars.

The second charge against appellant is that she participated in the deliberate omission of significant information from an official report intended for the Congress of the United States. What this charge relates to is the 211 Main prospectus prepared in the summer of 1982, after appellant was fully aware that the lease option date had, in fact, been missed. I find that prospectus did not contain the option renewal information it should have. A lease option renewal date is essential data which should be included in a prospectus. Moreover, I also find that the prospectus which left Region 9 was, indeed, an official document intended for use by Congress. (I-77, 42-44)

The reason it lacked completeness requires explanation. Once it became obvious to Kennedy and Yiakis that the lease option date covering Unit 1 of 211 Main had been missed, the immediate problem confronting them was to determine what steps could be undertaken to ameliorate the problem. As seen, they decided to try to persuade the landlord of 211 Main to waive the option date and to proceed to conduct GSA business as if adequate notice had been given. This approach held some prospect of success for the same provision on the same property had been missed in 1977 but the landlord had, through quiet negotiations, been persuaded to waive the notice requirement.

During much of June and July of 1982, the appellant and Yiakis waged their unsuccessful attempt to persuade the landlord to waive anew. The effort ended in failure. By the time the GSA entered

into a new lease for the property, the added costs are variously estimated to be as much as $32 million.[8]

During the time the confidential negotiations with the landlord wore on, it became necessary to prepare and forward to GSA headquarters in Washington a prospectus for 211 Main. But when the prospectus embracing Unit 1 was forwarded in June of 1982 it did not contain any mention of the required 360-day notice period. The prospectus did include the lease expiration date for Unit 1, but the deletion from the prospectus of the requirement that notice to exercise a lease option was required 360 days in advance of the expiration date unquestionably resulted in the document being incomplete.

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[8] Although the exact amount is in dispute, there is no doubt the sum is enormous.

The entire episode concerning the deletion of lease renewal information from the 211 Main prospectus in the summer of 1982 is part and parcel of the combined effort of appellant and Yiakis to try to persuade the landlord to waive the notice period as he had done previously. I find beyond question that Kennedy was implicated in this omission even if she is not considered the principal architect of the plan.

On the other hand, I do not consider that Kennedy was engaged in an effort to shield permanently from supervisory view the overlooked option date. Instead, she was seeking to buy time for the effort to cure the serious problems attendant to the oversight. Accordingly, while I conclude the preponderant evidence sustains charge 2, the motive behind the deletion was not shown nefarious or criminal in intent. That such a tactic might cause supervisors

concern over her reliability is beyond question.

Efficiency of the Service

Appellant's negligent administration of her assigned duties and the omission of essential data from an official document are matters which directly and adversely affect her work. Moreover, this misconduct also impacts upon the confidence her superiors can retain in her. The efficiency of the service can hardly be more seriously threatened than where, as here, the failure of a supervisor to perform her important duties in a prudent manner has caused the loss of millions of dollars. So, too, is the intentional omission of essential information from a government document a matter directly impacting upon the efficiency of the service.

Inasmuch as the basis of the removal is a question of appellant's ability to

accomplish her duties satisfactorily, not only would removal promote the efficiency of the service but the nexus between the conduct and the efficiency of the service is evident for the reason the cause for the removal is a question of the employee's ability to accomplish her duties satisfactorily. Cf. Hatcher v. Department of the Air Force, 705 F.2d 1315 (1983).

Appropriateness of the Removal. In this proceeding this issue carries particular importance because of the nature of the offenses and the caliber of the appellant. Besides, the parties seem far apart in their views on the question.

At the outset, I conclude that the suggestion of disparate treatment rings hollow. While it is true that others involved in this incident received lesser penalties, these employees had roles and responsibilities different from those of

the appellant and the circumstances of their discipline were not comparable to those of appellant Kennedy who had a more responsible position and for whom a higher standard of care is appropriate. Even the charges against her varied. What is more, her supervisor was removed. (But see my Initial Decision of September 20, 1983, in Yiakis v. GSA, MSPB Docket No. SF07528310163 wherein I found demotion more appropriate for her supervisor albeit based on different charges.)

The seminal case for determining the extent of the Board's review of an agency's selection of penalty is Douglas v. Veterans Administration, 5 MSPB 313 (1981). Under the guidelines there established, the Board will afford due deference to an agency's discretion in carrying out its obligation to maintain employee discipline. See Gregg v. United States Air Force, MSPB Docket

No. DA07528010134 at 4 (September 16, 1982). In other words, the Board functions not to displace this managerial role, but to assure that managerial judgment has been exercised within tolerable limits of reasonableness, Douglas, 5 MSPB at 332-333. Thus, the barometer for measuring appropriateness of an agency-imposed penalty is whether it is within the bounds of reasonableness in light of the relevant factors. Young v. U.S. Postal Service, MSPB Docket No. AT07528111161 at 2 (February 16, 1983); Davis v. Department of the Treasury, MSPB Docket No. NY075209075 at 5 (October 2, 1981). The Board does not write on a clean slate and will not freely substitute its own view for that of GSA on the question of what is the correct penalty. Thus, whether I consider removal best is not important; what is crucial is whether such a penalty is reasonable in

the circumstances. As will be explained, I conclude that the agency acted wholly within managerial bounds in removing the appellant.

I am aware that Kennedy's past disciplinary record is spotless. I realize that she has been a very capable employee during her ten years of federal service. She has progressed to jobs of increasing importance and, overall, has earned an enviable reputation. It seems, too, that the very nature of her duties meant that her days were busily filled in the performance of myriad duties.

But against these factors there must be weighed the nature and seriousness of the offenses sustained and their relationship to her duties. Without question appellant has failed to fulfill an important part of her duties. Add to that the fact that appellant participated in the omission of essential information from

an official document. The facts underscoring her removal reveal characteristics which are inappropriate for an employee in a responsible and fiduciary position and outweigh those favorable factors in her background.

Her rehabilitation potential is slight for supervisors will have little confidence in her ability to perform assigned duties. Lesser sanctions are hardly appropriate in that her performance defects are grave. The missed option has subjected GSA to adverse publicity and the amount of money lost has caused GSA to be ridiculed.

Removal is reasonable under the circumstances of this appeal because Kennedy was negligent in the performance of her duties and participated in the omission of information from a prospectus.

FINDINGS

Upon consideration of the facts of record, I find that: (1) to the extent indicated, the charges made against appellant Kathleen A. Kennedy have been shown by the preponderant evidence; (2) there is a clear nexus between the misconduct found sustained and the efficiency of the service; and (3) the penalty imposed by the agency has been appropriately chosen in light of the specific facts and circumstances involved in this case.

NOTICE

This is an initial decision. It will become a final decision of the Merit Systems Protection Board unless a petition for review is filed within thirty-five (35) calendar days after issuance of this decision or the Board reopens the case on its own motion. A petition for review shall be filed with the Office of the

Secretary of the Merit Systems Protection Board, 1120 Vermont Avenue, N.W., Room 904, Washington, D.E., 20419.

Any party, the Director of the Office of Personnel Management, and the Special Counsel may file a petition for review. The Director may request review only if he is of the opinion that the decision is erroneous and will have a substantial impact on a civil service law, rule, or regulation under the jurisdiction of the Office of Personnel Management. The Board may grant a petition for review, after providing an opportunity for response by other parties, when it is established that:

(1) New and material evidence is available that, despite due diligence, was not available when the record was closed; or

(2) The decision of the presiding official is based on

an erroneous interpretation of statute or regulation.

Petitions for review shall set forth objections to the initial decision, supported by references to applicable laws or regulations, and the specific references to the record.

Except for actions filed under the anti-discrimination laws, a petition for judicial review of a final Board decision must be filed in the United States Court of Appeals for the Federal Circuit no later than 30 days after appellant's receipt of the Board's final decision.

DATED: November 30, 1983

Edward J. Reidy
Administrative
Law Judge

Appendix C

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

KATHLEEN A. KENNEDY, appellant, v. GENERAL SERVICES ADMINISTRATION, agency.	DOCKET NUMBER SF07528310148

OPINION AND ORDER

The appellant was removed from the General Services Administration (the agency) for negligent administration of leases, and for participating in the deliberate omission of significant information from an official report intended for the Congress of the United States. She has petitioned for review of the November 30, 1983, initial decision sustaining her removal.*/

The appellant has objected to certain

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*/ In accordance with his notice of recusal dated April 11, 1984, the Chairman of this Board has not participated in the consideration of this case.

findings and statements made by the presiding official with respect to (1) her alleged failure to inform management officials (other than her immediate supervisor) of the error at issue in the case, (2) the general condition of her leasing files, (3) her alleged knowledge that a prospectus had been returned to the regional office for correction, and (4) her alleged knowledge of one of the previous failures to exercise options which were cited in the notice by which the agency proposed her removal. We note, however, that the agency's charges were not based on either of the first two matters listed above. With respect to the third and fourth matters, we find that, even if the appellant was unaware of these matters, other circumstances cited in the notice and elsewhere were sufficient to place her on notice of the need to implement effective methods for handling lease-renewal options.

We find further, on considering the other allegations raised in the petition for review, that the presiding official's findings regarding the legal issues which have been raised are essentially consistent with our views, and that any

inconsistency would not affect the outcome of this appeal. In addition, we find that those other arguments which relate to the presiding official's factual determinations have not demonstrated any error by the presiding official which would be sufficient to warrant the Board's full review of the record. See Weaver v. Department of the Navy, 2 MSPB 297, 299 (1980).

The petition for review is hereby DENIED. This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. § 1201.113(b).

The appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

_____ _____

(Date)

Washington, D.C.

Robert E. Taylor
Clerk of the Board

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing OPINION and ORDER was sent by certified mail this date to:

Ms. Kathleen A. Kennedy
116 Sylvia Way
San Rafael, California 94903

By regular mail service to:

Elizabeth G. Leavy, Esquire
Carroll, Burdick & McDonough
One Ecker Building, Suite 400
San Francisco, California 94105

Renn C. Fowler, Esquire
General Services Administration
525 Market Street, 28th Floor, 9L
San Francisco, California 94105

Office of Personnel Management
Attn: Appellate Policies Branch
Room 7P56B
1900 E Street, N.W.
Washington, D.C. 20415

By hand to:

Office of the Special Counsel
Merit Systems Protection Board
1120 Vermont Avenue, N.W.
Washington, D.C. 20419

_____ _____

(Date)

Washington, D.C. Robert E. Taylor
Clerk of the Board